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JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1895.

The Union Pacific Railway Company,
Plaintiff in Error,

vs.

GLADWYS JONES,
Defendant in Error.

No. 103.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Briefed by Plaintiff in Error on Motion of Defendant in Error.

JOHN M. THURSTON,
Attorney For Plaintiff in Error.

McGILL & WALLACE, Law Printers, Washington, D. C.

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We submit that the motion for damages under Rule 23, comes too late.

It should have been entered before the writ of error was dismissed.

We believe it to be the well-established rule of procedure that the plaintiff in error can dismiss at any time before the cause is brought on for hearing, or, at least, that he may dismiss, as a matter of right, up to the time some motion is made, or the attention of the court is called to the fact that defendant in error will resist a dismissal.

It is within the power of the defendant to move at any time for affirmance and damages because of the alleged frivolous character of the errors assigned; and although

the hearing of such motion might be deferred until the hearing upon the merits, yet the motion would be notice to the court that the plaintiff's right of dismissal was challenged.

In the absence of such challenge, the case was dismissed.

We submit the order of dismissal must stand.

The appeal in this cause was not dismissed by the plaintiff in error because of the lack of any error in the record, but principally because the Union Pacific Railway Company is now under receivership in foreclosure proceedings, and the solicitors of the receivers did not feel justified in insisting upon the further prosecution of the case, as a reversal would result in throwing the responsibility of a new trial upon the receivers, and their counsel deemed it unwise to invite the expense of another trial, the result of which could not be certainly foretold. The counsel now appearing and opposing the motion, if permitted to act upon his individual judgment, would cheerfully join opposing counsel in asking that the order of dismissal entered herein be vacated and the case considered on its merits.

That writ of error was not prosecuted in this cause for delay merely, and that counsel had ample ground for asking a final decision from this court will readily appear from the most casual examination of the record. It is suggested that the assignments of error in the record are insufficient under the rules of this court. Our own understanding of the practice is that the error of the Circuit Court of Appeals in a law cause consists in the act of affirming or reversing the judgment of the Circuit Court; and the only assignment of error necessary in this court is the one alleging that the Circuit Court of Appeals erred in affirming or reversing the judgment of the court below. Such must be the rule, for the decision of the Circuit Court of Appeals is indivisible. There may

be many different reasons assigned in the opinion of the court, but the only judicial act performed is that of reversing or affirming the judgment of the Circuit Court. Of course it is necessary, when this court comes to consider whether or not there was error in the judgment, reversing or affirming, to examine the record as it came from the Circuit Court, and to take up and consider each of the errors assigned in that record; but it would be most useless and burdensome to require any other assignment of error upon the prosecution of a writ of error in a cause like the one at bar, except the general allegation that the Circuit Court of Appeals erred in affirming the judgment of the Circuit Court.

Was There Error in the Proceedings of the Circuit Court as Disclosed by the Record?

We will only attempt on this motion to call the attention of the court to one, but that one is so flagrant, and establishes such a pernicious and dangerous rule of practice, that this court could not overlook it were it now urged for the purpose of securing a reversal of the judgment below.

The record shows that three persons were injured in a railway wreck. They were sisters, but that relationship gave them no other or greater rights in a court of justice than they would had possessed had they been strangers to each other. Each one of these persons had a separate and distinct action against the railway company. Each cause, to a certain extent, would require different evidence. It is not believed that in all the books there can be found a record in which a trial court compelled a defendant to submit the determination of three separate, distinct and independent causes of issue against him to the consideration of one jury, at one time, upon

consideration of all the evidence necessary to the issues of each and every cause. If a court can compel a railway company to try at one time and to one jury three separate and distinct causes of action in favor of three individuals, solely for the reason that each one was injured at the same time while traveling in the same train, then it can compel a joinder for trial purposes of all the claims for injury arising out of the wrecking of a train, the sinking of a steamer, the explosion of a mine or a riot in city.

It is useless to say that no injury could be worked to the defendant by compelling it to go to one jury at one time with the issues in all three cases, for the court will readily see that the narration of the injuries received by three persons, and the presence before the jury of three helpless or crippled claimants, would necessarily work upon the minds of the jury to an extent which the policy of the law has not deemed it wise to permit. If it is an error to permit evidence to be given to a jury not relevant or material to the cause, how can it rightly be done by joining upon trial another cause pending in the same court, against the same defendant, whereby the jury is permitted to hear much evidence relevant to the issue in one cause which is not relevant or material to the issue in the other. Such procedure, authorized by this court, will work a revolution in the trial of causes. Plaintiffs will combine together to mass their testimony, to group their wrongs, to swell their damages by joining forces in one presentment, to one jury, instead of leaving a defendant to his immemorial right to defend himself against each separate individual and each separate cause of action.

It seems to us the true test is—could these three causes of action have been joined in one petition or complaint? Could these three plaintiffs have united in bringing one suit? If not, they could not be compelled to join in one

trial of their three several causes of action, and if they could not be compelled to join in that way certainly the defendant could not. But it is urged (and this is the only justification attempted to support so novel and dangerous a practice) that the attorney for the defendant in the Circuit Court "insisted that the three causes should be consolidated and tried as one cause, and if a verdict was found there should be but one verdict and one judgment." In other words, the attorney insisted that there was but one cause of action against his client, the railway company. The court, however, held otherwise, and refused to submit these three causes as one cause, or to direct that one verdict should be returned and one judgment entered. The motion of the attorney for the defendant in the court below was therefore overruled.

Now, can it be said that because he made a motion, which was not sustained; because he insisted that there was but one cause of action, when, in fact, there were three, that thereby he conferred upon the Circuit Court of the United States the power to direct an illegal procedure, to compel the submission of three separate causes, of three separate plaintiffs, to one jury. We do not so understand the case. When defendant's motion, in the court below, was overruled, when his request was refused, the judge of that court in making further order for trial of the causes acted exactly as if the previous motion had not been made. At that time there was no motion before the court. The court must necessarily grant or refuse such a motion as was made by the defendant's attorney, and having granted or refused it further procedure must be directed in accordance with the law, just the same as if previous action had not been taken. The court then ordered that all three cases should be tried to one jury, not as one case but as three. The same jury was sworn at the same time in each of the three cases. They heard the evidence in all the causes, retired to their rooms to

consider at one time these three several claims, and returned into court from such consultation with three separate verdicts, fixing a different amount of damages for each plaintiff. The order of the court permitting and directing this procedure was objected to. The objection was overruled. The three causes were so tried against the protest of the defendant in the court below. His objection is preserved in the record, and we submit that it shows an error of the most glaring kind, and if this court is to set aside the motion of dismissal upon consideration of the record, we ask that the judgment of the court below be reversed.

JOHN M. THURSTON,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 103.

THE UNION PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

GLADWYS JONES, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY DEFENDANT IN ERROR.

R. T. McNEAL,
For Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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MOTION BY DEFENDANT IN ERROR.

Now comes the said defendant in error, by Robert T. McNeal, her attorney, and moves the Court that an order lately entered in said cause whereby, on the motion the plaintiff in error, its writ of error herein was dismissed, be so modified or amended as to direct that the judgment of the said circuit court of appeals be affirmed, with damages to defendant in error for delay, pursuant to rule No. 23 of this Court; or, if the relief sought by this motion cannot

otherwise be granted, that the said order of dismissal be vacated and this cause be considered on its merits and the said judgment be affirmed, with damages as aforesaid.

And for grounds of this motion defendant in error shows to the Court that the judgment, to review which the writ of error herein was sued out, was originally entered in her favor at the May term, A. D. 1891, of the circuit court for the district of Colorado; that the judgment of the circuit court of appeals affirming the same was entered February 1, A. D. 1892, and a writ of error to said court was issued March 17, a supersedeas bond being given on the 21st day of March, and the transcript of the record filed in this Court on the 7th day of April, 1892; that on or about the 14th day of November, 1895, plaintiff in error, when said cause had been pending in this Court over three years and a half and was about to be reached for argument, without notice to defendant herein or her counsel, who had made preparation to be present in this Court on the call of said cause and urge her rights in the premises, dismissed its said writ of error; and defendant in error respectfully submits to the Court that the two several writs of error and each of them were without merit, as appears from the face of the record and the opinion of the said circuit court of appeals, and were prosecuted for delay merely, whereby she has been unjustly and oppressively deprived of the much-needed use of the money awarded her, for over four years, and the said dismissal was made and done for the purpose of defeating her claim for damages for such delay under the rules of this Court.

And defendant in error begs leave to refer in support of this motion to the original transcript of record, which, though not printed in this Court, consists almost wholly of a printed copy of the record filed in the said circuit court of appeals; also to certified copies of two several bonds by plaintiff in error staying until the determination of this cause two other judgments in the circuit court for the dis-

trict of Colorado—one in favor of Winifred Jones and the other in favor of Katharine Jones—recovered at the same time and upon the same grounds as that of defendant in error, wherein and whereby plaintiff in error bound itself to pay in those cases all damages which might be assessed in this Court in this cause over and above the amount of the judgment herein, which said copies are herewith filed and made part hereof as Exhibits A and B; also to the opinion of the said circuit court of appeals appearing in the record in this cause and in volume 49 of the Federal Reporter, at page 343.

R. T. McNeal,
For Defendant in Error.

Ex. A.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Know all men by these presents, That we, The Union Pacific Railway Company, as principal, and David H. Moffat and Willard Teller, both of the county of Arapahoe and State of Colorado, as sureties, are held and firmly bound unto Katherine Jones, of Arapahoe county, State of Colorado, in the full and just sum of five thousand (5,000) dollars, to be paid to the said Katherine Jones, her heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the May term, A. D. 1891, of the circuit court of the United States for the district of Colorado, in a suit pending in said court of Katherine Jones, plaintiff, against The Union Pacific Railway Company, defendant, judgment was rendered against said The Union Pacific Railway Company for the sum of three thousand (3,000) dollars; and

Whereas, at the trial before the court and a jury, said cause was tried, together with two other suits then pending in said court, in one of which Winifred Jones was plaintiff and The Union Pacific Railway Company was defendant, and in the other of which Gladwys Jones was plaintiff and The Union Pacific Railway Company was defendant; and

Whereas a writ of error to the United States circuit court of appeals for the eighth circuit to reverse the judgment of the United States circuit court for the district of Colorado, in the case of Gladwys Jones against The Union Pacific Railway Company, was obtained, and judgment and execution in the case of Katherine Jones against The Union Pacific Railway Company was suspended to await the final determination of the case of Gladwys Jones against The Union Pacific Railway Company; and

Whereas and afterwards, in the United States circuit court of appeals for the eighth circuit, on, to wit, the first day of

February, A. D. 1892, the said cause of Gladwys Jones against The Union Pacific Railway Company was affirmed; and

Whereas a writ of error to the Supreme Court of the United States to reverse the judgment of the United States circuit court of appeals for the eighth circuit has been obtained, and said cause is now pending; and

Whereas in the case of Katherine Jones against The Union Pacific Railway Company application has been made to the circuit court of the United States for the district of Colorado by the attorney for the plaintiff for an execution upon the judgment rendered therein, and the court, being fully advised in the premises, is of the opinion that execution on the judgment should be stayed and suspended until the final determination in the Supreme Court of the United States in the case of Gladwys Jones against The Union Pacific Railway Company, and has made an order suspending and staying said execution on said judgment, conditioned on the filing of a good and sufficient bond in the sum of five thousand (5,000) dollars, to secure the payment of the judgment in said cause, together with all costs and damages which the circuit court of the United States for the district of Colorado may assess in case the case of Gladwys Jones against The Union Pacific Railway Company in the Supreme Court of the United States is affirmed:

Now, therefore, the condition of this obligation is such that said The Union Pacific Railway Company, having prosecuted said appeal from the judgment in the case of Gladwys Jones against The Union Pacific Railway Company to effect, and having failed to make good its plea, shall pay the judgment in the case of Katherine Jones against The Union Pacific Railway Company, together with all costs and damages which may accrue or which may be assessed by the circuit court of the United States for the district of Colorado in case damages shall be assessed in the Supreme Court of the United States in the case of Gladwys Jones against The Union Pacific Railway Company over and above the amount of the judgment had in said cause, then the above obligation to be void; otherwise to remain in full force and virtue.

THE UNION PACIFIC RAILWAY CO., [SEAL.]
By WILLARD TELLER, *Its Att'y-in-fact.* [SEAL.]
WILLARD TELLER. [SEAL.]
DAVID H. MOFFAT, [SEAL.]

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

David H. Moffat and Willard Teller, the sureties on the within bond, each being duly sworn, deposes and says that he is worth the sum of ten thousand (10,000) dollars over and above all of his just debts and liabilities and in property subject to levy and sale upon execution.

WILLARD TELLER.
DAVID H. MOFFAT.

Subscribed and sworn to before me this 14th day of May, A. D. 1892.

My commission expires January 25th, 1893.

[SEAL.] C. M. SPERRY,
Notary Public.

(Indorsed:) 2605. Circuit court. Katherine Jones *vs.* The Union Pacific Railway Company. Indemnity bond, $5,000. Approved and filed this 14th day of May, 1892. Robert Bailey, clerk.

A true copy.
Teste: ROBERT BAILEY, *Clerk.*

UNITED STATES OF AMERICA, }
District of Colorado, } ss:

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of an indemnity bond in cause number 2605, heretofore filed in said court, and in a certain cause lately in said court pending, wherein Katherine Jones was plaintiff and The Union Pacific Railway Company was defendant, as fully and completely as the same still remains on file in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 26th day of November, A. D. 1895.

[SEAL.] ROBERT BAILEY, *Clerk.*

Ex. B.

United States of America, } ss:
District of Colorado, }

Know all men by these presents, That we, The Union Pacific Railway Company, as principal, and David H. Moffat and Willard Teller, both of the county of Arapahoe and State of Colorado, as sureties, are held and firmly bound unto Winifred Jones, of Arapahoe county, State of Colorado, in the full and just sum of one thousand (1,000) dollars, to be paid to the said Winifred Jones, her heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the May term, A. D. 1891, of the circuit court of the United States for the district of Colorado, in a suit pending in said court of Winifred Jones, plaintiff, against The Union Pacific Railway Company, defendant, judgment was rendered against said The Union Pacific Railway Company for the sum of five hundred (500) dollars; and

Whereas, at the trial before the court and a jury, said cause was tried, together with two other suits then pending in said court, in one of which Katherine Jones was plaintiff and The Union Pacific Railway Company was defendant and in the other of which Gladwys Jones was plaintiff and The Union Pacific Railway Company was defendant; and

Whereas a writ of error to the United States circuit court of appeals for the eighth circuit to reverse the judgment of the United States circuit court for the district of Colorado in the case of Gladwys Jones against The Union Pacific Railway Company was obtained and judgment and execution in the case of Winifred Jones against The Union Pacific Railway Company was suspended to await the final determination of the case of Gladwys Jones against The Union Pacific Railway Company; and

Whereas and afterwards, in the United States circuit court of appeals for the eighth circuit, on, to wit, the first day of

February, A. D. 1892, the said cause of Gladwys Jones against The Union Pacific Railway Company was affirmed; and

Whereas a writ of error to the Supreme Court of the United States to reverse the judgment of the United States circuit court of appeals for the eighth circuit has been obtained and said cause is now pending; and

Whereas in the case of Winifred Jones against The Union Pacific Railway Company application has been made to the circuit court of the United States for the district of Colorado by the attorney for the plaintiff for an execution upon the judgment rendered therein, and the court, being fully advised in the premises, is of the opinion that execution on the judgment should be stayed and suspended until the final determination in the Supreme Court of the United States in the case of Gladwys Jones against The Union Pacific Railway Company and has made an order suspending and staying said execution on said judgment, conditioned on the filing of a good and sufficient bond in the sum of one thousand (1,000) dollars to secure the payment of the judgment in said cause, together with all costs and damages which the circuit court of the United States for the district of Colorado may assess in case the case of Gladwys Jones against The Union Pacific Railway Company in the Supreme Court of the United States is affirmed:

Now, therefore, the condition of this obligation is such that said The Union Pacific Railway Company, having prosecuted said appeal from the judgment in the case of Gladwys Jones against The Union Pacific Railway Company to effect and having failed to make good its plea, shall pay the judgment in the case of Winifred Jones against The Union Pacific Railway Company, together with all costs and damages which may accrue or which may be assessed by the circuit court of the United States for the district of Colorado in case damages shall be assessed in the Supreme Court of the United States in the case of Gladwys Jones against The Union Pacific Railway Company over and above the amount of the judgment had in said cause, then the above obligation to be void; otherwise to remain in full force and virtue.

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UNITED STATES OF AMERICA, } ss:
District of Colorado, }

David H. Moffat and Willard Teller, the sureties on the within bond, each being duly sworn, deposes and says that he is worth the sum of ten thousand (10,000) dollars over and above all of his just debts and liabilities and in property subject to levy and sale upon execution.

WILLARD TELLER.
DAVID H. MOFFAT.

Subscribed and sworn to before me this 14th day of May, A. D. 1892.

My commission expires January 25, 1893.

[SEAL.] C. M. SPERRY,
Notary Public.

(Indorsed:) 2604. Circuit court. Winifred Jones *vs.* The Union Pacific Railway Company. Indemnity bond, $1,000. Approved and filed this 14th day of May, 1892. Robert Bailey, clerk.

A true copy.
Teste: ROBERT BAILEY, *Clerk.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of an indemnity bond in cause number 2604, heretofore filed in said court, and in a certain cause lately in said court pending wherein Winifred Jones was plaintiff and The Union Pacific Railway Company was defendant, as fully and completely as the same still remains on file in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this twenty-sixth day of November, A. D. 1895.

[SEAL.] ROBERT BAILEY, *Clerk.*

Suggestions in Support of the Foregoing Motion.

The facts involved in this cause are few and simple and not controverted. In September, 1890, defendant in error, her mother and sister were passengers on a railway train of plaintiff in error. While proceeding at a speed of not over five or six miles per hour the train was overturned on a curve and the three ladies were injured, two of them severely and one slightly. Actions were brought by all of them in the circuit court for the district of Colorado, and all came on for trial at the May term of the court, 1891, when all of them were yet suffering from their injuries; one of them being unable to appear in court, testified by deposition. All the cases were set down for trial the same day, when, as the bill of exceptions of plaintiff in error, at page 9 of the transcript of the record in this court, recites, "—— it appearing that there were on the docket of said court at that time ready for trial and duly assigned for trial on that day two other suits against the said defendant, to wit, one by Katharine Jones and one by Winifred Jones, and it appearing that the causes of action in the three several causes arose out of one accident and one alleged negligence on the part of the defendant, the defendant insisted that the three causes should be consolidated and tried as one cause, and if a verdict was found there should be but one verdict and one judgment; but the plaintiff objecting thereto, the court decided to try all three causes on one trial, but to take a verdict in each cause and render judgment in each of the three causes." The cause of the overturning of the train was not very clear, but there was no pretence that it was due to any other than a defective condition of the track or the action of the engineer in operating the train. There was no claim or pretence that the ladies were in any sense guilty of contributory negligence or that they were not all in fact injured. Verdicts were returned awarding defendant in error $3,000, her

mother $3,000, and her sister $500. In the case of Gladwys alone a writ of error was sued out, the circuit court ordering that execution be stayed in the other two cases to abide the judgment of the circuit court of appeals in her case. On the affirmance of her judgment by that court her case was brought here on error, when plaintiffs in the other two suits applied for execution; but a further stay was ordered by the circuit court to abide the result in this case in this Court on condition that the defendant company secure the payment of such judgments, "together with all costs and damages which may accrue * * * in case damages shall be assessed in the Supreme Court of the United States in the case of Gladwys Jones * * * over and above the amount of the judgment had in said cause." So that all the cases have been practically pending in this Court since that time, and upon bonds which by their terms contemplate and provide for the damages for delay in case this Court should award them in this cause.

It is very doubtful whether plaintiff in error could be heard to complain in this Court under its assignments of error in the record, even if error had intervened in the circuit court of appeals. The errors assigned in the circuit court were: The trial of the three cases as one case by the same jury; the refusal to give six several instructions prayed; the direction to the jury to bring in three distinct verdicts; refusal to direct that plaintiffs could not recover for future suffering; overruling defendant's motion for a new trial; overruling defendant's motion in arrest of judgment; rendering judgment in favor of each of the several plaintiffs (Rec., pp. 30–32). In the circuit court of appeals it appears by the opinion of that court (49 Fed. Rep., pp. 344–'5) that the only errors complained of were the consolidation of the three cases, the direction of three several verdicts, and allowing the jury to consider future suffering of plaintiffs. One of the alleged errors was in the granting of its own motion, that the three cases should be consolidated; the

other, that separate verdicts should be returned, was so manifestly proper as not to admit of argument; and the third equally frivolous. Yet the errors assigned in the circuit court of appeals upon which this Court was asked to reverse the judgment of that court (Rec., p. 46) are that the circuit court of appeals erred 1st, in affirming the judgment of the circuit court; 2d, in refusing to sustain each and every of the assignments of error in the circuit court; 3d, in rendering judgment for Gladwys Jones. There is nothing in this assignment to even suggest what particular errors are relied on, and certainly only those matters could be assigned here which were relied on in the circuit court of appeals and which that court considered and ruled adversely to plaintiff in error.

It is submitted that it is manifest from the assignment of errors; from the fact that, though this cause has been pending here for over three and a half years and was liable to be called for argument during the first week of December, the record had never been printed; and from the frivolous character of the objections urged in the circuit court of appeals; this writ of error, as well as the one in that court, was sued out for delay merely; and the dismissal of the writ when it was about to be reached for argument was a confession upon the record that there was no error for this Court to consider. The language with which the opinion of the circuit court of appeals is concluded at page 346 of the Reporter, already referred to, is eminently just and worthy of quotation here: "In the instructions given the jury the trial court very carefully guarded the interests of defendant in all matters pertaining to the injury complained of and the extent of the recovery therefor, and the defendant is wholly without ground of just exception to any instruction given or not given upon these matters."

The rule invoked by defendant in error is of long standing in this Court, is salutary, and needs no interpretation. The facts to which it is asked that it be applied are not in

controversy. The general rule that a litigant has the right to dismiss his suit at pleasure, which is conceded, it is submitted has no application here. If so, the cases in which this rule should be most rigidly enforced will prove to be exempted from its operation. In most, if not all the cases, and there are many, in which this rule has been enforced, parties have shown a semblance of faith in their causes by incurring the expense of printing the records and submitting them to the court on their merits. Will the Court say a party who will not do this, and delays any action at all to the utmost period of delay to which the crowded condition of the docket will allow him to go, shall escape the penalty of this rule, when a party who prints his record, presents briefs, and takes the judgment of this Court shall pay the penalty of the delay occasioned by actually presenting his cause here which the Court finds to be without merit? In three of the latest decisions by this Court on this question it appears that the plaintiff in error insisted on the alleged errors, and in some of them filed quite elaborate briefs; and yet this Court concluded that the cases were all brought here for delay, and awarded 10 per cent. damages.

Sire *vs.* Ellithorpe A. B. Co., 137 U. S., 579.
Everett *vs.* Wilson, 139 U. S., 266.
Gregory *vs.* Cons. M. Co., 141 U. S., 222.

If the rule should be enforced in such cases, certainly it should not be relaxed where a party allows the case to remain here until about to be reached for argument on its merits, and then comes into court and by dismissing his writ of error confesses there was no reason for prosecuting it, thereby securing all the benefits of a long delay and attempting to escape its penalty and to deprive his adversary of the indemnity provided by the rule.

The facts upon which this motion is based may be exceptional. Whether so or not, it is submitted that it is im-